IN THE

Supreme Court of the United States

No. 75-1762

LAWRENCE M. KLEMOW,

Petitioner,

vs.

TIME INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioner Lawrence M. Klemow prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania rendered in these proceedings on January 29, 1976.

Opinions and Judgments Below

The Court of Common Pleas of Luzerne County, Pennsylvania, *en banc* granted judgment against Petitioner on June 28, 1974, with opinion. The order granting judgment and opinion are printed as Appendix C, hereto, *infra,* p. A9. The order and opinion are reported at 64 Luzerne County, Pa., Legal Register 209 (1974). On January 29, 1976, the Supreme Court of Pennsylvania granted judgment favorable in part to Petitioner, vacating the judgment of the Court of Common Pleas of Luzerne County, and remanding for further proceedings consistent with the court's opinion. The opinion, containing the court's judgment, is printed as Appendix B, hereto, *infra,* p. A2. The opinion is not yet reported. On March

5, 1976, the Supreme Court of Pennsylvania denied Petitioner's request for reargument, without opinion. The order denying reargument is printed as Appendix A hereto, *infra,* p. A1.

Jurisdiction

The Supreme Court of Pennsylvania entered judgment vacating the judgment of the Court of Common Pleas on January 29, 1976 (Appendix B, p. A2). A timely Petition for Reargument was filed by Petitioner on February 9, 1976, and was denied by order of March 5, 1976 (Appendix A, p. A1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), granting jurisdiction to this Court to review final judgments rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Statement of Questions Presented for Review

1. Did the Supreme Court of Pennsylvania err in holding that the Due Process clause of the Fourteenth Amendment of the Constitution requires a state to limit its jurisdiction to members of a class who reside within its territorial boundaries—

(a) where Petitioner, a Pennsylvania resident, seeks to represent a nationwide class of consumers to recover small individual damages;

(b) where the corporate defendant concedes that the Pennsylvania court has *in personam* jurisdiction over it by reason of its extensive activities within the Commonwealth,

including formal qualification to do business and the maintenance of several offices there; and,

(c) where the defendant does business with consumers nationwide.

2. Did the Supreme Court of Pennsylvania, in excluding non-residents from state class actions, violate the Privileges and Immunities clause of Article IV, § 2, of the Constitution?

Constitutional Provisions Involved

Article IV, § 2, of the Constitution:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, § 1 (second sentence):

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

1. Background

On December 8, 1972, Respondent Time Incorporated ("Time Inc.") announced its intention to terminate publication of Life Magazine within two weeks, unfilled subscription contracts notwithstanding. On December 11, 1972, Petitioner Klemow, a subscriber, instituted this action, alleging a breach of contract by Time Inc. and a plan by Time Inc. to enrich itself by retaining subscription prepayments. The complaint sought relief on behalf of Petitioner and a class of similarly situated subscribers.

On approximately February 15, 1973, Time Inc. announced an offer to send prepaid subscribers either a sum of money or alternate publications. The offer did not specify how the sum of money would be calculated (if this option were selected) or how the value of its unperformed obligation to deliver Life would be translated into alternate publications (if selected). Thereafter, many, but not all, subscribers communicated with Time Inc. and indicated a preference for money or alternate publications (subject to availability at Time Inc.'s discretion.)

What happened thereafter is not fully of record, but Time Inc. admits that in the aftermath of Life's termination approximately 146,000 prepaid subscribers nationwide, including Klemow, received nothing at all from their unexpired subscriptions, and 355,000 have received alternative publications unilaterally selected by Time Inc. although they did not indicate in advance any willingness to take them.

Petitioner Klemow contends that all terminated subscribers have been dealt with inequitably, that such subscribers had contracts to receive a highly desirable and valuable subscription, and that Time Inc. has sought to turn its back on its obligations by providing little or nothing (as in Klemow's case) to those who paid about $30 million.

2. Course of the Proceedings

Time Inc. filed preliminary objections to Klemow's complaint, asserting, in the alternative, that class actions to recover individual money damages are barred under Pennsylvania civil procedure or, that, even if such actions are not barred, the court should exercise its discretion to deny maintenance of a class action.

The Court of Common Pleas, in the course of considering these objections, *sua sponte* raised the question of its jurisdiction over subscription contracts entered into in different

states and countries by persons not residents of Pennsylvania. In a written order of December 21, 1973, the Court of Common Pleas directed the parties to answer 13 questions, including:

> "12. What is the jurisdiction of the court and the feasibility of this court assuming jurisdiction over contracts entered into in different states and countries by non-residents? This question to be answered by plaintiff and defendant."

In reply, Time Inc. cited this Court's decisions regarding state court judgments against non-resident defendants, including *Pennoyer v. Neff*, 95 U.S. 714 (1877), *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) and *Hanson v. Denckla*, 357 U.S. 235 (1958). Time Inc. contended that there existed a territorial limitation of state court jurisdiction which could not be affected by bringing a suit as a class action.

The Court of Common Pleas did not decide the question of its jurisdiction to hear a nationwide class action because it decided that the action "as a class action" should be dismissed (Appendix C, p. A9). The Court of Common Pleas based its class denial on summary conclusions that plaintiff would not ultimately be able to show more than nominal damages and that handling of the case as a class action in Luzerne County, Pennsylvania, would not be "judicially or economically feasible." (Appendix C, p. A9).

Petitioner filed a timely appeal to the Supreme Court of Pennsylvania. Time Inc. again raised on appeal its contention that the limited jurisdiction of a state court makes maintenance of a nationwide class action impossible, citing *Pennoyer v. Neff, International Shoe, McGee*, and *Hanson v. Denckla:*

> "As a matter of federal constitutional law Luzerne County is not an appropriate forum for this class action

> . . . A Pennsylvania Court of Common Pleas is without jurisdiction to bind any non-joining member of the purported class not within Pennsylvania."

Petitioner urged that class suits were an exception to the general rule that a party must be present in a jurisdiction to justify a decision binding on him or her. The National Consumer Law Center, Inc., of Boston, Massachusetts, appeared in the Supreme Court of Pennsylvania as *Amicus Curiae* for the limited purpose of briefing the question of whether a nationwide class action in Pennsylvania state courts should be permitted. *Amicus* argued that a state court has the power in a class action to issue a judgment binding on both non-resident and resident class members as long as the class representative adequately protects their interest and that such power is not offensive to the Due Process clause of the Fourteenth Amendment. *Amicus* also questioned exclusion of non-residents as a violation of the Privileges and Immunities clause of Article IV, § 2, of the Constitution.

Treating the denial of class action status as a final order under Pennsylvania appellate practice (Appendix B, p. A2), the Supreme Court of Pennsylvania held that the Court of Common Pleas erred in prematurely denying class action status and that Klemow must be afforded a reasonable opportunity to establish that the case meets the minimum requirements for maintaining a class action.

The Supreme Court of Pennsylvania gave directions, including a statement of the minimum requirements of class action maintenance in Pennsylvania and of a limitation on class membership. The Supreme Court of Pennsylvania stated:

> "[Note] 15. Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts. See *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965); *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 307, 70 S.Ct. 652 (1950); *Pennoyer v. Neff*, 95 U.S. 714 (1877); Cf. *Simpson v. Simpson*, 404 Pa. 247, 172 A.2d 168 (1965); *McGinley v. Scott*, 401 Pa. 310, 164 A.2d 424 (1960)."

On February 9, 1976, Petitioner requested reargument on the jurisdictional issue. Petitioner adopted the brief previously filed by *Amicus*, National Consumer Law Center, Inc., and attached it to and made it part of his petition for reargument. On March 5, 1976, the Supreme Court of Pennsylvania denied reargument *per curiam* (Appendix A, p. A1).

3. Statement of Facts Material to Consideration of the Questions Presented.

Klemow is a resident of Luzerne County, Pennsylvania. Time Inc. is a corporation organized and existing under the laws of the State of New York. Time Inc. is duly qualified to do business in Pennsylvania, does extensive business there, and maintains business offices and a registered office there.

Time Inc. solicits prospective subscribers and distributes published products throughout the United States.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. This Court has jurisdiction.

(a) The judgment of the Supreme Court of Pennsylvania is "final" within the meaning of 28 U.S.C. §1257.

The judgment of the Supreme Court of Pennsylvania is "final" within the meaning of 28 U.S.C. §1257 although it is true that it does not literally end the case. This Court has held that such judgments may be final for purposes of review. *Mills v. Alabama*, 384 U.S.214,217 (1966); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S.386,389 at n.4. (1964). The requirement of finality must be given a "practical rather than

a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541,546 (1949) (finding finality for appeal from federal district courts under 28 U.S.C. § 1291.) The interpretation of finality in *Cohen* and subsequent §1291 cases applies equally to §1257, involving review of state court judgments. *Local No. 438 v. Curry*, 371 U.S. 542,548 (1963). If review were not granted at this stage, the Court of Common Pleas would be bound to limit the class, as directed by the Supreme Court of Pennsylvania. The case would proceed to judgment so limited, and Petitioner would not have another opportunity to raise the question of state court jurisdiction to include non-residents in the class. This case is within the holding of *Local No. 438*, *supra*, at 458, where this Court did not wait until the litigation had finally been resolved in the state court since the state court had finally determined its jurisdiction and erroneously so. This case is also within the holding of *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156,162 (1973), where a judgment was held final because the petitioner could not preserve the constitutional question then ripe for decision.

(b) The basis of the holding is solely federal.

The Supreme Court of Pennsylvania based its jurisdictional holding solely on the Due Process clause of the Fourteenth Amendment. Although it did not expound its rationale, the Due Process basis is clear both from the record and from the authorities cited by the Supreme Court of Pennsylvania. Concededly, the Supreme Court of Pennsylvania cited three of its own prior decisions as well as three decisions of this Court for its holding, but these Pennsylvania cases suggest no independent state ground.

Nor is there anything in the Pennsylvania constitution or statutes suggesting an intention on the part of Pennsylvania to limit its state court jurisdiction to less than its full federal

constitutional reach, as defined by the decisions of this Court, applying the Due Process clause. To the contrary, the Pennsylvania legislature has adopted broad long-arm statutes showing intent to expand state court jurisdiction to its federal constitutional limit. 42 Pa.C.S. §8301-8310 (note particularly, §8309(b), extending jurisdiction and venue of Pennsylvania courts to include foreign corporations "to the fullest extent allowed under the Constitution of the United States.")

Respondent Time Inc. cannot now argue that the Supreme Court of Pennsylvania might have been expounding Pennsylvania law since Time Inc. never raised any independent state ground for limiting the jurisdiction of state courts to resident class members. To the contrary, it based its objections to a nationwide class, both in the Court of Common Pleas and on appeal, upon the Due Process clause.

2. The Supreme Court of Pennsylvania has determined a federal question of extraordinary importance, not squarely decided heretofore by this Court, and its decision is probably not in accord with applicable decisions of this Court.

This Court has not previously determined the power of state courts to bind persons not residents in a consumer class action, where a plaintiff seeks small individual damages on behalf of a nationwide class. If the state courts are held to lack such power, consumers with small individual damages, not able to meet jurisdictional requirements of federal courts, will have a practical means to vindicate their rights sharply limited. Because claims of individual class members arising from the termination of a magazine subscription are inherently small, any challenge to unilateral action by a publisher would necessarily have to proceed in class action form. The smallness of individual claims makes it totally uneconomical

for anyone to litigate this issue on an individual basis with competent counsel. See *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 161 (1974). ("No competent attorney would undertake this complex antitrust action to recover so inconsequential [$70.00] an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.")

This action turns on questions of uniform state law, including provisions of the Uniform Commercial Code. Had the action qualified for federal court jurisdiction under federal law, without regard to the amount in controversy, the entire class of terminated Life Magazine subscribers throughout the United States would have been permitted to maintain a class action challenging conduct of Time, Inc. with nationwide application. *Appelton Electric Co. v. Advance-United Expressways,* 494 F.2d 126 (7th Cir.1974); *Calagaz v. Calhoon,* 309 F.2d 248 (5th Cir. 1962). To impose a state resident limitation on class members would create a judicial environment wholly antithetical to the commercial world in which magazine publishers and many other national corporations do business. As Time Inc. itself pointed out in its brief on appeal:

> "...if Klemow should seek to represent only those former subscribers who at the time the suit is approved as a class action or at the time of judgment reside in Pennsylvania, there are no means available to determine which former subscribers have moved into Pennsylvania since December 1972 and which have moved out."

In restricting the availability of federal courts to class actions involving individual claims of less than $10,000, this Court has pointed to state court class actions as the proper alternative to expansion of federal jurisdiction. *Snyder v. Harris,* 394 U.S.332,340-1 (1969).

The complementary character of our state and federal judicial systems will be dealt a severe blow if small consumer

transactions of national scope cannot be adequately dealt with in either system. This case squarely raises the question whether a class action, challenging a national consumer practice, must be dismembered into statewide classes of affected persons.

This Court has already stated, in more limited contexts, that a class action including non-residents could be "maintained in a state court, and would [be] binding on all the class, we can have no doubt." So stated, in *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 256,266 (1921) (action to restrain misuse of trust funds). Compare, *Hartford Life Insurance Co. v. Ibs,* 237 U.S. 662,672 (1914) (prior class judgment in Connecticut held to bar action by plaintiff in Minnesota seeking share of an insurance fund); *Royal Arcanum v. Green,* 237 U.S. 531,538 (1914) (prior class judgment in Massachusetts held to bar action for injunction and declaratory relief in New York.)

In *Hansberry v. Lee,* 311 U.S. 32,41 (1942), this Court recognized that a class or representative suit is an exception to the rule that a person not made a party is bound by a judgment. In *Hansberry,* 311 U.S. at 42-43, this Court observed that an adequate representative, who insures full and fair consideration of the common issue, may permit one person to stand in judgment for a whole class. What the Supreme Court of Pennsylvania failed to recognize was that the class action device presupposes that class members are absent and, hence, that this court's line of decisions on due process, as applied to parties defendant, was inapplicable.

Class actions generally serve important objectives of judicial economy, individual relief for small claimants, and deterrence for illegal activities. In the consumer class action context, judicial economy often is not the dominant factor because a multiplicity of individual actions by small claimants is unlikely. Objectives of affording individual

relief and of providing incentives for voluntary compliance with the law assume much more prominence in a class action on behalf of consumers. In "Redress of Consumer Grievances: Report of the National Institute for Consumer Justice," the National Institute, which was established at the suggestion of the President in February, 1971, stated at pages 28-29:

> "THAT THE MAIN GOAL OF CONSUMER CLASS ACTIONS SHOULD BE TO PROVIDE REDRESS FOR CONSUMERS' INJURIES CAUSED BY UNLAWFUL ACTIVITIES THAT AFFECT LARGE NUMBERS OF CONSUMERS AND THEREBY TO PROVIDE INCENTIVES TO BUSINESSMEN TO AVOID SIMILAR INJURIES IN THE FUTURE.
>
> The consumer class action is not primarily a device to save court time through the consolidation of a number of lawsuits. Since most class members in consumer class action cases will have too small a stake to bring individual suits, the alternative is not many suits, but no suit.
>
> Ideally each consumer would receive individual redress of his grievances by use of the class action. But because many claims in consumer class actions are small or unprovable, it will not always be possible or feasible to achieve the desired redress by making good the individual damages incurred by each person represented. In such cases other means of redress can be considered.
>
> A properly constructed class action procedure can be an efficient device to provide businessmen with incentive to avoid injuring a large number of consumers in the future."

Consumer class actions serve the same objectives, whether brought in the federal or state courts. Whether such class actions will be brought in the federal or state courts, often depends upon jurisdictional considerations of the amount in controversy. The distinction between the broad objectives of class actions on the one hand, and jurisdictional requirements on the other, was pointed out in *Snyder v. Harris*, 394 U.S.332, 341 (1969) where this court held:

> "Moreover, while the class action device serves a useful function across the entire range of legal questions, the jurisdictional amount requirement applies almost exclusively to controversies based upon diversity of citizenship. A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy. Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts."

Because small individual claims under state law must be brought in the state rather than in federal courts, it is important to clarify the power of a state court to handle an interstate consumer claim against a national company. As noted earlier, such claims may be litigated economically, if at all, only in the form of a class action. If a state provides a liberal class action rule comparable to the Federal Rule 23, then the question is not so much one of access to the courts but what is the most efficient remedy for small individual claims that are common to great numbers of persons. On the other hand if a state does not provide for class actions for consumers, then access to any judicial remedy by individual claimants in that state is foreclosed. This was pointed out in the dissenting opinion of Justice Brennan in *Zahn v. International Paper Co.*, 414 U.S. 291, 308 (1973):

> "Moreover, if the State does not provide a Rule 23(b)(3) device, litigation of the claims of class members who either lack the jurisdictional amount or simply prefer to litigate their claims in the state courts—as they would be free to do under any construction of the jurisdictional requirement—will produce a multitude of suits. And the chief influence mitigating that flood—the fact that many of these landowners' claims are likely to be worthless because of the cost of asserting them on a case-by-case basis will exceed their potential value—will do no judicial system credit."

As set forth in the Pennsylvania Supreme Court opinion below, Pennsylvania does have a liberal class action device by judicial precedent, guided by amended Federal Rule 23. Unless a national class action were able to be maintained in the Pennsylvania state courts on behalf of Life Magazine subscribers, access of non-resident class members to judicial relief will be foreclosed in all other states which do not provide for consumer class actions, and also in all other states which do provide for such class actions, but where no class action on behalf of Life subscribers has in fact been commenced on a timely basis.

Equally important, if the claims of the class members are meritorious, the defendants will not be held accountable to afford relief to great numbers of affected persons and will not be deterred from committing similar acts in the future.

Moreover, if one state does not have power to maintain a national plaintiff's class action, this would of necessity encourage a multiplicity of statewide class actions in other states, if any relief at all is to be available for affected persons in those states. The encouragement of a multiplicity of actions in different states is an invitation to the risk of inconsistent adjudications on the merits, and an inefficient and duplicative use of judicial resources to adjudicate what is essentially a single dispute affecting many persons.

Accordingly, unless the power of state courts to maintain a national consumer class on behalf of small claimants, alleging an illegal interstate practice by a national company, is clarified, Supreme Court precedent supporting the principle that small claims involving state law should be brought in the state courts will fail. And the objectives of class actions for judicial economy, individual relief to small claimants, and deterrence will be seriously undermined if state courts are foreclosed from exercising their full power to adjudicate claims of all affected class members, both residents and non-residents alike.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

LAWRENCE M. KLEMOW,

Appellant

v.

TIME INCORPORATED

No. 592 January Term, 1974

Endorsement on Appellant's Petition for Reargument

Appeal from Decree of the Court of Common Pleas of Luzerne County, at No. 35 October Term, 1972, Dated June 28, 1974.

March 5, 1976. Petition Denied. *Per Curiam.*

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

LAWRENCE M. KLEMOW,

Appellant

v.

TIME INCORPORATED

No. 592 January Term, 1974

Opinion of the Court

Appeal from Decree of the Court of Common Pleas of Luzerne County, at No. 35 October Term, 1972, Dated June 28, 1974.

ROBERTS, J. FILED: January 29, 1976

Appellant Lawrence Klemow was a subscriber to LIFE Magazine, formerly published by appellee Time, Inc. In December 1972 appellee announced that after the December 29, 1972 issue LIFE would no longer be published. On December 11, 1972, appellant instituted this class action in equity seeking an injunction to compel appellee to continue

publishing LIFE. The preliminary injunction was denied.[1] As finally amended, appellant's complaint sought damages alleging that Time's offers to those with unexpired subscriptions to LIFE of other magazines, books or refunds were inadequate.

Appellee filed preliminary objections[2] to the amended complaint contending, *inter alia,* that (1) appellant had an adequate remedy at law; and (2) the action was not properly a class action because "each member of the alleged class is severally entitled to recover money damages and . . . the amount to be recovered and the basis for determining that amount will vary among members of the alleged class."

During the fifteen months which elapsed before the trial court ruled on the preliminary objections the parties were directed to answer questions propounded *sua sponte* by the trial court, concerning the class, costs, and damages sought to be proved.[3] On June 28, 1974, the court filed a "decision" and

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[1] The request for an injunction directing Time, Inc., to continue publication of LIFE was, in effect, an action for specific performance of the subscription contract. We agree with the trial court that this was not a proper case for specific performance. See *Payne v. Clark,* 409 Pa. 557, 566, 187 A.2d 769, 771 (1963); *Ralston v. Inmsen,* 204 Pa. 588, 592, 54 A. 365, 366 (1903).

[2] Pa. R. Civ. P. 1017(b), 1509.

[3] There is no authority to support the trial court's directing interrogatories to the parties on its own motion. The information sought by the court, necessary for an adjudication of the merits of the action should be established in the record by the parties through discovery and at trial. The trial court is not empowered to conduct its own factfinding investigation. Its actions here were inconsistent with the established role of the trial court in adversary litigation. See American Bar Association Standards of Judicial Administration, Standards Relating to Trial Courts. § 2.00, and commentary thereto; cf. *Commonwealth v. Butler,* 448 Pa. 128, 291 A.2d 89 (1972); *Commonwealth v. Myer,* 278 Pa. 505, 123 A. 486 (1924).

order dismissing appellant's action as a class action, and dismissing the individual action without prejudice "since [appellant] has an adequate remedy at law." The opinion of the trial court, *en banc*, dismissing the action stated: (1) plaintiff cannot recover punitive damages;[4] (2) "plaintiff cannot show that damages for himself and the class will be more than nominal;" (3) "to handle this case as a class action here would not be judically or economically feasible." We vacate the decree and remand for further proceedings.[5]

The order of the trial court sustained the preliminary objection that appellant had an adequate remedy at law. Rule 1509 of the Pennsylvania Rules of Civil Procedure provides:

> "(c) The objection of the existence of a full, complete and adequate non-statutory remedy at law shall be raised by preliminary objection. If the objection is sustained, the court shall certify the action to be law side of the court."

In *Shaffer v. Dooley*, 452 Pa. 414, 308 A.2d 597 (1973), the Court held, in a unanimous opinion by Mr. Chief Justice Jones, that Rule 1509(c) requires that the chancellor certify an action to the law side of the court when a preliminary objection that there is an adequate non-statutory remedy at law is sustained. See *Trimble Services, Inc. v. Franchise Realty Interstate Corp.*, 445 Pa. 333, 285 A.2d 113 (1971); *Setlock v. Sutila*, 444 Pa. 552, 282 A.2d 380 (1971); *Highway Lounge, Inc. v. Shaler Enterprises Corp.*, 441 Pa. 201, 272 A.2d 175 (1971); *Siegel v. Engstrom*, 427 Pa. 381, 235 A.2d 365 (1967). Thus, even though we agree that this is not a proper case for equitable relief, it was error for the trial court to dismiss the action instead of transferring the action to the law side of the court for disposition.

This appeal is not so easily resolved, however. Appellee concedes that the discontinuance of publication constituted a breach of the subscription contracts. By deciding on the undeveloped record that appellant could establish no more than a claim for nominal damages, the trial court went beyond what it could properly determine on preliminary objections.[6] Appellant alleges that the alternatives offered to subscribers, including pro-rata refunds, were inadequate. Though appellee might establish that its offer is adequate, the amount of damages in a breach of contract action can usually be determined only after discovery, and, if necessary, a trial.[7]

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[4] The punitive damage issue was not raised in the preliminary objections and therefore was not, at that point, presented for resolution by the trial court. If the punitive damages issue were raised by preliminary objections it might be treated as a motion to strike. See *Hudock v. Donegal Mut. Ins. Co.*, 438 Pa. 272, 264 A.2d 668 (1970).

[5] We hear this appeal under authority of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, § 202(4), 17 P.S. § 211.202(4) (Supp. 1975). Appellee has filed a motion to quash the appeal contending that the order of the trial court dismissing the action as a class action is not a final, appealable order. This motion is without merit and is denied. *Bell v. Beneficia Consumer Discount Co.*, ... Pa. ..., ...A.2d ... (decided Nov. 26, 1975); *Lee v. Child Care Services*, ... Pa. ..., 337 A.2d 586 (1975), U.S. appeal dismissed for want of a substantial federal question, 44 L.W. 3263 (Nov. 3, 1975).

[6] Appellee did not assert on preliminary objections that no cause of action had been stated. The preliminary objections were directed at the propriety of maintaining the suit as a class action for equitable relief. Thus, the question which the trial court addressed was not raised and should not have been decided. Moreover, it is doubtful whether the legality of damages sought could be raised by preliminary objections in the nature of a demurrer. Goodrich-Amram, § 1017(b)-11; *Hudock v. Donegal Mut. Ins. Co.*, 438 Pa. 272, 277 n.2, 264 A.2d 668, 671 n.2: "This rule is a sound one because a plaintiff should not be put out of court completely merely because he alleges the wrong measure of damages."

[7] In proper circumstances the matter may be adjudicated through a Motion for Judgment on the Pleadings, Pa. R. Civ. P. 1034, or a Motion for Summary Judgment, Pa. R. Civ. P. 1035.

Deciding at this juncture that appellant would be entitled to no more than nominal damages deprived appellant of the opportunity to prove his claim by the established procedures.[8] The case should proceed as an action at law for recovery of damages for breach of contract.

Prior to the resolution of the damage issue, appellant must be allowed an opportunity to sustain his burden that the case is properly maintainable as a class action. Appellant should be afforded a reasonable opportunity to amend his complaint, and establish, if he can, that the case meets the minimum requirements for maintaining a class action: (1) he is a member of the class;[9] (2) the class consists of persons "so numerous as to make it impracticable to join all as parties;"[10] (3) "he will adequately represent the interests of all class members;"[11] (4) his interest are consonant with all members of the class;[12] (5) there is a common issue shared by all class members which can be justly resolved in a single action;[13] and

[8] See *Buchanan v. Brentwood Federal Savings & Loan Ass'n*, 457 Pa. 135, 320 A.2d 117 (1974).

[9] *McMonagle v. Allstate Ins. Co.*, ... Pa. ...., 331 A.2d 467 (1975); *Penn Galvanizing Co. v. Philadelphia*, 388 Pa. 370, 130 A.2d 511 (1957).

[10] Pa. R. Civ. P. 2230.

[11] *Id.* See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968): "To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation."

[12] *Luitweiler v. Northchester Corp.*, 456 Pa. 530, 319 A.2d 899 (1974); *Penn Galvanizing Co. v. Philadelphia*, 388 Pa. 370, 130 A.2d 511 (1957).

[13] See *McMonagle v. Allstate Ins. Co., supra*, noting the "obvious relevance of federal practice under [Fed. R. Civ. P.] 23;" *Buchanan v. Brentwood Federal Savings & Loan Ass'n, supra; Korona v. Bensalem Twp.*, 385 Pa. 278, 122 A.2d 800 (1956).

(6) the relief sought is beneficial to all class members.[14] A party purporting to represent a class who cannot, after a reasonable opportunity, define and limit the class so that the matter will move to trial will be found not to have sustained the burden necessary to proceed as a class.

Here it is conceivable that appellant could plead and establish that he can properly represent a class composed of all Pennsylvania residents[15] with similar unexpired LIFE subscriptions who have not settled their claims and have similar damage claims to be resolved.[16] Even if appellant cannot

[14] *Luitweiler v. Northchester Corp.*, 456 Pa. 530, 319 A.2d 899 (1974); *Penn Galvanizing Co. v. Philadelphia*, 388 Pa. 370, 130 A.2d 511 (1957). We need not here decide whether there are, in certain cases, additional requirements which one who attempts to bring a class action must meet, *e.g.*, as required under the federal practice, that the class action is superior to other available methods for handling the controversy. See *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975); *Katz v. Carte Blanche*, 496 F.2d 747 (3d Cir. 1974).

[15] Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts. See *Potwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965); *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228 (1958); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 307, 70 S. Ct. 652 (1950); *Pennover v. Neff*, 95 U.S. 714 (1877); *cf. Simpson v. Simpson*, 404 Pa. 247, 172 A.2d 168 (1960); *McGinley v. Scott*, 401 Pa. 310, 164 A.2d 424 (1960).

[16] Appellant's complaint states that he represents a class of all persons who had unexpired LIFE subscriptions—more than 5 million people. The record indicates however that the class of which he is a member will be substantially smaller. The class is limited by the court's jurisdiction, note 15 *supra*. It also appears that there were various subscription agreements not all of which may be sufficiently similar to appellant's. Furthermore, appellee contends many subscribers have settled their claims which, if true, would preclude recovery of damages on their behalf.

establish that the action is a proper class action, his individual damage action may still go forward.[17]

Trial courts are vested with broad discretion in determining definition of the class as based on commonality of issues and the propriety of maintaining the action on behalf of the class. We cannot agree, however, that the trial court may simply pronounce, as it did here that "to handle the case as a class action here would not be judicially or economically feasible."

A cause of action has been stated with a damage claim to be resolved by our established litigation process. Appellant must be afforded an opportunity to proceed at law in an action for damages and to establish, if he can, that he may do so on behalf of a class.

Decree vacated. Case remanded for certification to the law side of the court and proceedings consistent with this opinion. Each party pay own costs.

Mr. Chief Justice JONES did not participate in the consideration or decision of this case.

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[17] Plaintiff attempts to assert a cause of action for fraud. The successful maintenance of a cause of action for fraud includes, *inter alia*, a showing that the plaintiff acted in reliance on the defendant's misrepresentations. *Thomas v. Seamans*, 451 Pa. 347, 304 A.2d 134 (1973); *Savitz v. Weinstein*, 395 Pa. 173, 149 A.2d 110 (1959); *Edelson v. Bernstein*, 382 Pa. 392, 115 A.2d 382 (1955). Because such a showing would normally vary from person to person, this cause of action is not generally appropriate for resolution in a plaintiff-class action. Thus, plaintiff might choose to proceed individually on this claim and his damage claim.

APPENDIX C

IN THE COURT OF COMMON PLEAS

of Luzerne County
Civil Action—Equity
Class Action

LAWRENCE M. KLEMOW,
on behalf of himself and all
others similarly situated,

Plaintiffs,

v.

TIME INCORPORATED,

Defendant.

No. 35
October Term, 1972

Decision

Before: Hourigan and Podcasy, *JJ.*

This case comes before the court on defendant's preliminary objections to plaintiff's second amended complaint. Defendant's objections in substance are (1) "Objections in the Nature of a Demurrer" which raises the question of adequate remedy at law; and (2) "Petition to Dismiss the Class Action for Lack of Jurisdiction."

Plaintiff instituted this action on December 11, 1972, in his own behalf and on behalf of all subscribers of Life after defendant had publicly announced that it would cease publication of Life magazine. On December 18, 1972, a hearing was held on plaintiff's request for a preliminary injunction to prevent Life from ceasing publication, which request was denied. Plaintiff subsequently filed his first amended complaint to which defendant filed preliminary objections. The case was listed for argument which was not held since they agreed that plaintiff would file a second amended complaint. Preliminary objections to the second amended complaint are now before this court.

Plaintiff's complaint does not set forth his cause of action in a concise and summary form, and if defendant had requested a more specific pleading, it would have been granted. After argument, in order to clarify the issues, a conference was held between the court and counsel. A series of questions to aid in the determination of the issues were propounded and answers to them have been filed.

Plaintiff was one of 5,137,000 persons receiving Life magazine on a weekly basis, he, having entered into a prepaid subscription contract with defendant. Plaintiff seeks to represent as a class those persons similarly situate to him, who had unexpired subscription contracts with defendant and that class approximates 3,304,000. The remaining 35% of those receiving Life did not have direct subscription contracts with defendant; they have been receiving Life as part of an arrangement or agreement between defendant and others to provide Life as a substitute for other magazines which had previously ceased publication.

On December 8, 1972, defendant announced that it would cease publication of Life, and thereafter published its last

issue on or about December 22, 1972. Plaintiff alleges that as part of a fraudulent and deceptive plan and in an attempt to convert a portion of book liability for unearned subscriptions of $30,000,000 into profit, defendant did cease publication and breached its contracts with its subscribers. Plaintiff claims compensatory and punitive damages on behalf of himself and class members for defendant's breach of contract by termination of Life.

Whether this action lies at law or in equity it is clear that plaintiff cannot recover punitive damages.

> "(A)n allowance of vindictive damages, ... is not permitted in actions for a breach of contract, with very rare exceptions, perhaps in none, except the single case of breach of promise of marriage. The violation of most contracts involves a breach of faith. If a promissor must respond in damages for that as well as for his violation of his promise, he must make duplicate satisfaction."
>
> *Hoy v. Gronoble,* 34 Pa. 9, 11 (1859)

Further, the Restatement of Contracts, Section 342, states:

> "Punitive damages are not recoverable for breach of contract."

Moreover, there is a precedent for holding that in Pennsylvania exemplary damages are not permitted in equity cases.

In *Peoples' National Bank v. Kern,* 193 Pa. 59, 63 (1899), the court stated:

> "Decrees in equity, even where based upon frauds and conspiracies, are given for amounts out of which the injured parties have been defrauded, and not for punitive damages, fines or penalties."

Therefore, it is clear that in this action plaintiff and class members would be entitled to only compensatory damages.

> "A recovery on a class basis is a proper remedy only if there exists sufficient data from which the court can make a just and reasonable estimate of the damage."
>
> *Lieberman v. Howard Johnson's Inc., et al.* Court of Common Pleas of Philadelphia County, No. 4168 July Term, 1972, p. 44

We must therefore consider what plaintiff has set forth in his pleadings and answers to designated questions as to damages and to what damages plaintiff is entitled under the law.

The general rule is that the measure of damages for breach of contract for failure to deliver goods is the difference between the market price and the contract price. *Uniform Commercial Code,* 12A Pa. 2-713; *Seward Pa. Salt Mfg. Co.,* 266 Pa. 457 (1920).

> "The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade."
>
> *Uniform Commercial Code,* 12 A Pa. 2-713, Comment 2

Plaintiff alleges that Life was unique in that there is no presently published magazine having a comparative quality or scope of content. It therefore appears that upon the basis of plaintiff's pleadings, plaintiff cannot show a market value for Life.

Unless proof shows that the subject of the contract has a market value greater than the contract price, plaintiff can recover only nominal damages in the absence of a showing of no market value and actual damages resulting from breach. *Seward v. Pa. Salt Mfg. Co., supra.*

Plaintiff in his answer to designated questions states the following in respect to damages at page 5:

> "Damages for Group I are the fair value of LIFE, as calculated for the various unexpired terms, ranging from one week to in excess of one hundred weeks. Relevant factors to be weighed in determining the fair value are as follows: (1) amounts paid by subscribers; (2) the per copy price of LIFE; and (3) the cost of producing and delivering LIFE."

It therefore appears that plaintiff has alleged no actual damages, nor does he intend to prove any actual losses. The cost of producing and delivering LIFE is not the measure of damages.

Williston on Contracts, Third Edition Section 1343, states at page 225:

> "On the other hand, if the seller has broken the contract and the buyer had brought suit, the value of goods for the purpose of damages would be their value to the buyer—the market price, or cost of securing other similar goods—not the seller's cost of manufacturing them." (Underscoring added).

It is clear from the answers to designated questions that defendant has offered to direct subscribers as an alternative choice of subscriptions to other magazines to replace Life, a pro rata cash refund, which amount is determined by the individual's unexpired subscription term and price paid for subscription.

In *Lieberman v. Howard Johnson's et al., supra,* at page 38, the court stated:

> "However, it would be an exercise in futility to allow this action to continue if the costs of the suit, including

among other things, notice and attorneys' fees, is so great that the class members would not materially benefit. *Eisen v. Carlisle & Jacquelin,* 391 F. 2d at 1567. Also see, Comment, *Management Problems for the Class Action Under Rule* 23 (b) (3) 6 U. of San. Fran. L. Rev. 343 (1972). Therefore, it is necessary for Plaintiff to show that the anticipated award of total *actual* damages be comparatively large in relation to anticipated costs."

Here, upon the basis of the pleadings and answers to designated questions, plaintiff cannot show that damages for himself and the class will be more than nominal. Further, defendant has offered class members restitution as part of its termination offer which many of the class have accepted.

Accordingly, to permit this suit to proceed as a class action would be an exercise in futility and of no material benefit to the members of the class.

As noted in the answers to the propounded questions, the records and witnesses are basically located in New York City or Chicago. Considering those factors and the court's calendar, it is believed that to handle this case as a class action here would not be judicially or economically feasible. We note also in the answers (see defendant's answer number thirteen) that there are other class actions in Illinois arising from defendant's termination of publication.

Since the action will not continue as a class action, it becomes necessary for the court to resolve whether plaintiff's individual action should be in equity or law. The plaintiff may be entitled to damages for a breach of contract. The damages can be ascertained on the law side without the granting of relief prayed for in the second amended complaint. There is no need for the application of equitable principles in resolving the issue of damages.

We have considered transferring the case to the law side of the court, but because the complaint is primarily drafted for a class action, it would be difficult, if not impossible, to answer on the individual's claim. Therefore, so that the issues between the parties can be clearly presented, we will dismiss this complaint without prejudice.

Accordingly, we enter the following:

ORDER

NOW, this 28th day of June, 1974, at 2:00 P.M., it is ordered that plaintiff's action as a class action is dismissed.

It is further ordered that plaintiff's action on behalf of himself is dismissed without prejudice since he has an adequate remedy at law.

BY THE COURT *EN BANC,*

HOURIGAN,
J.

IN THE

Supreme Court of the United States

No. 75-1762.

LAWRENCE M. KLEMOW,

Petitioner,

v.

TIME INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CITATIONS.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Whether footnote 15 of the opinion of the Pennsylvania Supreme Court in this matter constitutes a final judgment within the meaning of 28 U. S. C. § 1257(3) from which a writ of certiorari could lie.

2. Whether, even if footnote 15 of the opinion of the Pennsylvania Supreme Court in this matter is a final judgment from which a writ of certiorari could lie, there exists an adequate, independent nonfederal ground for the result reached in footnote 15 of the opinion of the Pennsylvania Supreme Court.

3. Whether the Pennsylvania Supreme Court correctly determined that "because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents."

4. Whether footnote 15 of the opinion of the Pennsylvania Supreme Court implicates to any extent the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution in that non-residents of Pennsylvania are specifically given the opportunity to submit voluntarily to the jurisdiction of a Pennsylvania court.

RULE INVOLVED.

Rule 2230 Pennsylvania Rules of Civil Procedure.

> (a) If persons constituting a class are so numerous as to make it impracticable to join all as parties, any one or more of them who will adequately represent the interest of all may sue or be sued on behalf of all, but the judgment entered in such action shall not impose personal liability upon anyone not a party thereto.
>
> (b) An action brought on behalf of a class shall not be dismissed, discontinued, or compromised nor shall a voluntary nonsuit be entered therein without the approval of the court in which the action is pending.

COUNTERSTATEMENT OF THE CASE.

On December 8, 1972, after having sustained a cumulative loss in excess of $30 million over the previous four years, and anticipating a loss in excess of $10 million during the next year if LIFE Magazine were to continue to be published, Time Incorporated ("Time Inc."), respondent herein, announced the suspension of publication of LIFE Magazine.

Procedural History.

Within three days of the announcement, Lawrence M. Klemow ("Klemow"), petitioner herein, commenced an action in equity in the Court of Common Pleas of Luzerne County, Pennsylvania, purporting to represent a class in excess of five million "subscribers" to LIFE, seeking, *inter alia*, a mandatory injunction compelling Time Inc. to continue publishing LIFE Magazine for the duration of any and all subscriptions for LIFE Magazine. Subsequent to Time Inc.'s filing preliminary objections to the complaint pursuant to Rule 1017 of the Pennsylvania Rules of Civil Procedure, Klemow filed his first amended complaint. Time Inc. again filed preliminary objections, and at argument on the preliminary objections, Klemow offered, and leave was granted, to amend a second time.

In the second amended complaint, Klemow purported to represent himself and a class consisting of all persons who had unexpired subscription contracts with Time Inc. The second amended complaint no longer sought an injunction prohibiting Time Inc. from discontinuing publication of LIFE until all subscription contracts had expired, but claimed to be brought in equity by seeking a "complicated accounting." Once more, Time Inc. filed preliminary objections asserting that Klemow had an ade-

quate remedy at law and that no proper class action was stated pursuant to Pennsylvania practice.

After Time Inc.'s preliminary objections were briefed and argued, the Court of Common Pleas directed a variety of interrogatories to both parties probing both factual and legal questions raised with regard to the propriety of a class action. In response to the Court's designated question No. 12 relating to the jurisdiction of the Court of Common Pleas of Luzerne County, Pennsylvania, Time Inc. noted that because the jurisdiction of a state court is territorially limited, the Court of Common Pleas would have jurisdiction only over Pennsylvania residents, and that the Court did not have power to bind an individual having absolutely no contact with the Commonwealth of Pennsylvania.

On June 28, 1974, Time Inc.'s preliminary objections were sustained both in respect of the class action and the adequacy of Klemow's individual remedy at law. Because the Court simply dismissed all class action aspects of the complaint, the Court of Common Pleas never dealt with the question whether its jurisdiction properly extended beyond the borders of Pennsylvania, nor was that question ever posed directly by either party in the Court below.

On appeal to the Pennsylvania Supreme Court, Klemow did not press the issue raised here for the reason that the Court of Common Pleas had not premised its dismissal of his case on any concept of territorial limitation other than to note that forums other than the Court of Common Pleas of Luzerne County, Pennsylvania, appeared to be more convenient for Klemow's law suit. As appellee in the Pennsylvania Supreme Court, Time Inc., of course, urged all potential grounds for affirming the order of the Court of Common Pleas that class action treatment was inappropriate. Among others, Time Inc. asserted that a class action under Pennsylvania procedure would be improper in this case because a class action would not yield material benefit to the members of the purported class and because common law fraud allegations do not form a proper basis for a class action. Finally, Time Inc. contended that dismissal of the class action should be affirmed in that the Court of Common Pleas of Luzerne County, Pennsylvania, was not the proper forum for the nationwide class purported to be represented by Klemow. Time Inc.'s argument centered on the due process limitation inherent in a state court's attempted exercise of jurisdiction over nonparties having no meaningful contacts with Pennsylvania.

The Pennsylvania Supreme Court vacated the decision of the Court of Common Pleas on two grounds:

1. The Pennsylvania Supreme Court held that under Pennsylvania practice, it is improper to dismiss a case originally brought in equity on the basis that an adequate remedy at law exists; rather, proper practice is to transfer the case from equity to law; and

2. The Pennsylvania Supreme Court held that it was improper under Pennsylvania practice for the Court of Common Pleas to have resolved an issue of damages and thus the class action question based only on the existence of a complaint and preliminary objections.

The Pennsylvania Supreme Court vacated the decision below, and remanded the matter for further proceedings pursuant to which plaintiff would be permitted to file an amended complaint on the law side, and would be permitted "an opportunity to sustain his burden that the case is properly maintainable as a class action." (A6).

Because plaintiff never sought a stay in either the Pennsylvania Supreme Court or this Court, and because his application to the Court of Common Pleas of Luzerne County for a stay was properly denied, the matter is presently proceeding in the Court of Common Pleas of Luzerne County; plaintiff has engaged in pre-complaint discovery pursuant to Pennsylvania practice, and plaintiff's amended complaint is due to be filed on June 30, 1976.

Implementation of the Suspension of Publication of LIFE Magazine.

Although the mechanics of the suspension of publication of LIFE Magazine do not directly relate to the Petition for a Writ of Certiorari filed herein, a brief description of the process is necessary in light of certain misleading statements contained in the Petition.

Shortly after the suspension of publication with LIFE's December 29, 1972 issue, everyone who purchased subscriptions to LIFE from Time Inc. which were in force at the time of the suspension of publication was offered either a cash refund, a choice of magazines, or a book in substitution for the remaining issues of LIFE due under his subscription. Anticipating that not all these subscribers would respond to the first solicitation, a second mailing was prepared and sent to those subscribers who had not noted an affirmative choice as of the date of the mailing of the second solicitation. The second solicitation noted that if an affirmative response was not received within a reasonable time, Time Inc. would substitute a magazine of its choice to satisfy the remaining portion of any nonrespondent's subscription. At the present time, virtually every subscriber of LIFE Magazine at the time of its suspension (with the exception of Klemow) has received and accepted either a cash refund, a substitute magazine or a book.

ARGUMENT.

Footnote 15 of the Opinion of the Pennsylvania Supreme Court in This Matter Does Not Constitute a Final Judgment Within the Meaning of 28 U. S. C. § 1257(3).

This Court's certiorari jurisdiction is limited by statute to consideration of final judgments. 28 U. S. C. § 1257(3). Because the Court must first determine its jurisdiction before reaching the merits, it is appropriate initially to analyze the Opinion of the Pennsylvania Supreme Court to decide whether it constitutes a final judgment within the meaning of 28 U. S. C. § 1257(3) from which a writ of certiorari could lie.

Pursuant to the Order of the Pennsylvania Supreme Court, this case has been remanded to the Court of Common Pleas of Luzerne County where plaintiff now has the opportunity to file yet another amended complaint and to attempt to plead a class action within the parameters of Pennsylvania procedure. No answer to a complaint has been filed in the three and one-half years during which this case has proceeded. The amended complaint to be filed is subject to preliminary objections under Pennsylvania practice. Thus, far from being final, this case has just begun. Based on present posture alone, one would be tempted to conclude that this case cannot give rise to a final judgment subject to the jurisdiction of this Court.

More substantively, however, when the issue from which certiorari is sought is compared with the judgment of the Pennsylvania Supreme Court, it can be seen that footnote 15 of the Opinion limiting any future class to Pennsylvania residents was not necessary to the judgment. To that extent, footnote 15 constitutes dictum, or at best precatory language, and cannot constitute a final judgment within the meaning of 28 U. S. C. § 1257(3) from which a writ of certiorari could lie.

Moreover, the nonfinal nature of footnote 15 is exemplified by the conditional nature of plaintiff's status as a purported class representative. If the Pennsylvania Supreme Court had held that Klemow stated a proper class action under Pennsylvania procedure but that the class could not include non-residents of Pennsylvania, the due process issue sought to be raised might then be in a posture from which this Court could exercise its certiorari jurisdiction. In this case, however, Klemow has not yet been found to have stated any class action, let alone one limited solely to Pennsylvania residents. Thus, it is likely that on remand Time Inc. will file preliminary objections to Klemow's anticipated amended complaint challenging the propriety of any class Klemow purports to represent. If, at that time, the Court of Common Pleas holds that no class action is proper under the facts of this case, then, the question whether a Pennsylvania state court class action must comprehend non-residents will never have to be decided in this case. It is additionally possible that Klemow might be certified as a representative of a class limited to Pennsylvania residents as a matter solely of Pennsylvania procedure, in which case the federal question claimed to be raised here would not require decision. Apparent from this scenario is the fact that the issue sought to be presented here may be mooted by the further proceedings under Pennsylvania procedure.

Whether the due process question will ever have to be addressed in this case, thus, becomes problematical at best and hypothetical at the least. A judgment subject to uncertain future applicability such as footnote 15 cannot be final within the meaning of 28 U. S. C. § 1257(3).

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market St. Ry. Co. v. Comm.*, 324 U. S. 548, 551 (1945); *See also Costarelli v. Massachusetts*, 421 U. S. 193, 196 (1975).

Mr. Justice Frankfurter stressed the importance of maintaining firmly the concept of finality in *Radio Station WOW v. Johnson*, 326 U. S. 120, 124 (1945):

> "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U. S. C. § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

Judged by the standards enunciated above, footnote 15 is not sufficient to confer certiorari jurisdiction on this Court.

Footnote 15 itself can have no effect on the ultimate outcome of the litigation. Klemow has his individual action against Time Inc. without regard to the existence of a nationwide class, and similarly, the question whether Klemow is entitled to represent any class will be answered without regard to the geographical composition of the purported class. The finality issue presented here, thus, is distinguishable from cases such as *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975), and *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U. S. 156 (1974), in that the questions raised there either determined the outcome of the case [1] or would be irretrievably lost.[2] Neither result is possible here. As noted, this litigation will proceed regardless of the composition of any potential class, and Klemow will have no less standing later to raise the due process issue than he has now. Thus, because footnote 15 of the Opinion of the Pennsylvania Supreme Court cannot constitute a final judgment, the Petition for a Writ of Certiorari should be denied.

Even if Footnote 15 Constitutes a Final Judgment Within the Meaning of 28 U. S. C. § 1257(3), There Exists an Adequate Independent Nonfederal Ground for Decision Over Which This Court Does Not Have Jurisdiction.

Based on the posture in which this matter was appealed to the Pennsylvania Supreme Court, neither party "raised" the question of territorial restriction. Klemow did not because the Court of Common Pleas had not based

1. A decision in favor of the petitioner in *Cox Broadcasting* would have totally obviated the necessity for a trial.

2. Under North Dakota procedure, the Pharmacy Board was not permitted to appeal from its own orders. Thus, removal of the constitutional issue from Board consideration assured that the issue could never be raised again. *North Dakota State Bd. of Pharmacy*, 414 U. S. at 163.

its class action decision on any concept of territoriality. And Time Inc. did not in that the two pages devoted to the issue in its brief in the Pennsylvania Supreme Court do nothing more than suggest an additional basis for a finding of unmanageability of any nationwide class that might have been designated. Because neither party focused on the constitutional issue involved in the territoriality question, it is understandable that the Pennsylvania Supreme Court's holding was simply that "Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents." (A7).

It is impossible to determine from the remainder of footnote 15 of the Opinion whether the statement quoted above is based on the United States Constitution, the Pennsylvania Constitution, a combination of both, or whether in fact, the statement was made in the Court's role as the ultimate supervisor of Pennsylvania practice and procedure. The citation to decisions of this Court would indicate some reliance on the federal Constitution. On the other hand, reliance on earlier Pennsylvania Supreme Court decisions may lead to the conclusion that footnote 15 is based on a reading of Article 1, § 11 of the Pennsylvania Constitution or an interpretation of the common law territorial limitation on the jurisdiction of a forum. Finally, the Court may have referred to prior case law solely for the purpose of providing background for its exercising its general supervisory and administrative authority [3] in issuing class action guidelines, a task it has

3. The Pennsylvania Supreme Court's supervisory power derives from Article 5, § 10(a) of the Pennsylvania Constitution:

> "The Supreme Court shall exercise general supervisory and administrative authority over all courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate."

recently undertaken with some frequency. *See, e.g., McMonagle v. Allstate Ins. Co.*, — Pa. —, 331 A. 2d 467 (1975); *Buchanan v. Brentwood Federal Savings & Loan Assn.*, 457 Pa. 135, 320 A. 2d 117 (1974); *Luitweiler v. Northchester Corp.*, 456 Pa. 530, 319 A. 2d 899 (1974).

Were the Pennsylvania Supreme Court exercising its general supervisory powers or interpreting the Pennsylvania Constitution or common law in footnote 15 (and there is nothing in the record or the Court's opinion to indicate otherwise), the Court's determination that a Pennsylvania state court class action should be limited to Pennsylvania residents and those non-residents voluntarily submitting themselves to Pennsylvania's jurisdiction, is a holding of state law only, and is not reviewable in this Court. *See, e.g., Jankovich v. Indiana Toll Road Comm.*, 379 U. S. 487 (1965); *Black v. Cutter Laboratories*, 351 U. S. 292 (1956); *Durley v. Mayo*, 351 U. S. 277 (1956); *Stembridge v. Georgia*, 343 U. S. 541 (1952); *Klinger v. Missouri*, 13 Wall. 257 (U. S. 1871). As noted by Justice White in *Jankovich, supra*, 379 U. S. at 489:

> "It is undoubtedly '"the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U. S. 207, 210.' *Cramp v. Board of Public Instruction*, 368 U. S. 278, 281."

In light of the substantial likelihood that an adequate independent state ground formed the basis for footnote 15 of the Pennsylvania Supreme Court's Opinion, the Petition for a Writ of Certiorari should be denied.

Even if Footnote 15 of the Pennsylvania Supreme Court's Opinion Is Found to Constitute a Final Judgment Based Solely on an Interpretation of Federal Law, the Pennsylvania Supreme Court Correctly Held That "the Class May Consist Only of Pennsylvania Residents."

Although respondent believes that sufficient grounds have been presented for denial of the Petition for a Writ of Certiorari, it is necessary briefly to address the merits of footnote 15 of the Opinion of the Pennsylvania Supreme Court in this matter, to highlight the correctness of the decision below.

Stated simply, if this issue is reached, the question is whether the due process clause of the Fourteenth Amendment to the United States Constitution permits a state court to exercise jurisdiction over non-residents having no contacts of any sort with the forum state. Of the millions of former subscribers to LIFE Magazine located throughout the world, many, if not most, have never set foot within the Commonwealth of Pennsylvania and have never had any contact of any sort with Pennsylvania. A Pennsylvania state court does not have jurisdiction to bind such persons, and, as such, a Pennsylvania class action may consist properly only of Pennsylvania residents and those non-residents who submit to Pennsylvania's jurisdiction.

The decisions of this Court are clear that before a person may be bound by a state court judgment, that individual must have had certain minimum contacts with the forum, and that such a rule is "a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U. S. 235, 251 (1958); *Pennoyer v. Neff*, 95 U. S. 714 (1877).

Even though the rather inflexible rule stated in *Pennoyer* has been modified by cases such as *Hanson v. Denckla, supra; McGee v. International Life Ins. Co.*, 355

U. S. 220 (1957); and *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), this Court has not abandoned the concept of territorially limited state judicial power. Nor has this Court sought to distinguish between defendants and plaintiffs in the application of due process requirements. *See Pennoyer v. Neff*, 95 U. S. at 722-23.

Although Klemow might argue that the sending of notice can cure any due process defect created by attempting to proceed with a nationwide class action in a state court, the decisions of this Court do not support that result, and in fact such decisions recognize the inherent inability of a state court to bind non-residents having no contacts with the forum regardless of notice. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950); *Hansberry v. Lee*, 311 U. S. 32 (1940).

The inexorable conclusion is that the mere denomination of an action as a class suit cannot eradicate the territorial limitation on the jurisdiction of a state court. *Note, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 U. C. L. A. L. Rev. 1002, 1012 (1971) ["However, one thing is clear a state court does not have jurisdiction over, and therefore cannot bind, a non-resident individual 'with which the state has no contacts, ties or relations.' "].

Because the Pennsylvania Supreme Court correctly determined in footnote 15 of its Opinion that Pennsylvania class actions should be limited to Pennsylvania residents and those non-residents who voluntarily submit to Pennsylvania's jurisdiction, the Petition for Writ of Certiorari should be denied.

By Stating That a Pennsylvania Class Action "May Consist Only of Pennsylvania Residents," and That "the Class May Also Include Non-Residents Who Submit Themselves to the Jurisdiction of the State Courts," the Pennsylvania Supreme Court in No Way Implicated the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

Although petitioner includes in his statement of questions presented for review one concerning the Privileges and Immunities Clause of the United States Constitution, Klemow offers no argument on the matter, and cites no authority. The only reference in the petition to this issue is a citation to an *amicus* brief filed in the Pennsylvania Supreme Court on behalf of Klemow. There, however, the totality of the argument presented in relation to the Privileges and Immunities Clause consisted of footnote 3 at page 23 of the brief, quoted in full below:

> "*Exclusion* of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this State's courts, in violation of the Privileges and Immunities Clause of the United States Constitution. *See Rejsenhoff v. Colonial Navigation Co.*, 35 F. Supp. 577, 579 (S. D. N. Y. 1940)." (emphasis added).

Thus, Klemow no doubt misread footnote 15 of the Pennsylvania Supreme Court's Opinion, because footnote 15 does not exclude non-residents from the class; rather, footnote 15 makes Pennsylvania's courts available to all non-residents voluntarily submitting to Pennsylvania's jurisdiction.

Because Klemow apparently does not seriously raise the Privileges and Immunities issue, the Petition for a Writ of Certiorari should not be granted on this question.

CONCLUSION.

In light of the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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